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CASE CLIPS

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CRIMINAL LAW ISSUES

LATTA v. STATE, No. 46S03-0004-PC-236, ___ N.E.2d ___ (Ind. Mar. 16, 2001).
BOEHM, J.

In 1990, Jacqueline Latta was convicted of the felony murder of her two-year-old son Brad Latta and sentenced to fifty years imprisonment. She sought postconviction relief on the ground that she was denied effective assistance of counsel. She and her husband, Roger Latta, were tried jointly and were represented by the same counsel. Latta's claim of ineffective assistance of counsel included the contention that this joint representation created an impermissible conflict that adversely affected her defense. . . .

Joint representation is not inherently impermissible. Latta consented to the joint representation after it was challenged by the State at her trial. The principal issues raised by the joint representation were whether her consent was knowing and intelligent and, if so, whether a conflict created by joint counsel can nevertheless be so severe that a defendant's Sixth Amendment right to effective counsel requires a retrial. We have no findings by the postconviction court on either point. The latter remains an open question under the Sixth Amendment. We do not resolve the issues raised by joint representation because we find ineffective assistance of counsel on other grounds and agree that a new trial is required. However, we include a discussion of the problem of joint representation in the hope that it is helpful to trial courts facing this difficult issue.

. . . .

The Court of Appeals held that Latta was denied effective assistance of counsel by reason of Studtmann's actual conflict of interest in representing both Latta and Roger. Latta v. State, 722 N.E.2d 389, 392 (Ind. Ct. App. 2000). The court then concluded that Latta had demonstrated that an actual conflict of interest existed, that this conflict had adversely affected her representation, and that the representation resulted in actual prejudice. The court held that Latta had waived the issue by failing to object to joint representation at trial. Nevertheless, the Court of Appeals held that permitting the joint representation constituted fundamental error and ordered a retrial.

. . . .

Latta maintains that she was prejudiced by the introduction into evidence of Roger's unredacted pre-arrest interview in which Roger was asked and, on counsel's objection that "answering it might tend to incriminate," refused to answer questions such as "Did Jackie set the fire?" She also points to Studtmann's closing argument, in which he referred to the possibility that Roger was innocent but covering up for Latta: . . . .

Although the Court of Appeals found fundamental error in permitting the joint representation of both Lattas, we believe this case presents a more conventional claim of ineffective assistance of counsel independent of the issues raised by joint representation.

. . . .

Bruton [v. United States, 391 U.S. 123 (1968)] reasoned that an inculpatory statement by one defendant may be admissible against that defendant under the rules of evidence. Because that defendant cannot be compelled to testify, the other defendant's right of cross-examination is violated by introduction of the statement. In this case, Roger did not testify and Latta had no opportunity to cross-examine him. However, it is not Roger's testimony, but rather his silence and their joint counsel's objections to which Latta objects. Roger never admitted to any involvement in or knowledge of the fire, but he failed to answer several questions after Studtmann objected that the question called for an "incriminating" response. Latta argues persuasively that the effect is the same as if the court had admitted inculpatory answers from Roger, which would plainly be a Bruton violation. We agree that admission of Roger's statements violated Latta's right to cross-examine unless Roger testified at trial, which he did not. The questions to Roger and counsel's objections bore directly on Latta's guilt or innocence and Latta had no opportunity to cross-examine Roger to attempt to establish that his silence was based on circumstances that do not inculpate her. . . .

Although a Bruton claim was waived, we think counsel's failure to object to an unredacted transcript including objections and unanswered questions from Roger's pre-arrest interview is compelling evidence of ineffective assistance of counsel. . . . [T]he postconviction court's conclusion that this was trial strategy seems indefensible.

. . . .

We agree with the Court of Appeals that the postconviction court was clearly erroneous in finding that Studtmann's representation met acceptable performance standards. For the reasons explained in Part II, however, we do not agree with the court that joint representation is inherently a Sixth Amendment violation.

. . . .

The Sixth Amendment right to counsel encompasses a right to counsel of one's choice. [Citation omitted.] Thus, joint representation is not a per se violation of the constitutional guarantee of effective assistance of counsel. Hanna v. State, 714 N.E.2d 1162, 1166 (Ind. Ct. App. 1999) (citing Holloway v. Arkansas, 435 U.S. 475, 482-83 (1978)). . . .

. . . As the United States Supreme Court pointed out in Wheat v. United States, 486 U.S. 153, 159-62 (1988), this situation presents the trial court with a direct conflict between the defendant's claim to counsel of her choice and the risk that either a direct appeal or a postconviction court will find the joint counsel to have been ineffective despite the defendants' insistence on joint representation at trial. This difficulty is illustrated by a comparison of Hanna with the Court of Appeals' decision in Latta's case. In Hanna, as here, the State moved to disqualify defense counsel jointly retained by five co-defendants. The defendants had been advised of the risks of joint representation by defense counsel, a magistrate, and independent counsel, but voluntarily and knowingly waived the conflict of interest. The trial court nevertheless granted the State's motion to disqualify counsel. 714 N.E.2d at 1164. The Court of Appeals reversed, holding that the trial court abused its discretion in granting the motion because the State had not established a conflict sufficient to override the defendant's choice of counsel. [Citation omitted.] . . .

. . . Relying on Hanna, the Court of Appeals concluded that Latta had not waived her right to object to joint representation because the trial court had not sufficiently performed its duty of ensuring Latta's right to a fair trial in accordance with the Sixth Amendment right to counsel. [Citation omitted.] The Court of Appeals resolved the issue principally in terms of waiver. However, Hanna also noted that the court has an independent interest in

ensuring a fair trial and may, in some circumstances, properly refuse a defendant's waiver of his right to conflict-free representation. [Citation omitted.] . . .

Even if we were to conclude that Latta's waiver of Studtmann's conflict was knowing and voluntary, the issue remains whether her initial waiver may serve to waive all future conflicts and any ineffective assistance of counsel claim based on these conflicts. Justice Marshall, concurring and dissenting in Cuyler, thought it impossible to waive all potential conflicts, especially where a waiver is obtained in the early stages of trial before it is feasible to contemplate all of the possible conflicts. 446 U.S. at 354 n.1. But the United States Supreme Court has given us no further clear guidance on this point. . . .

The post-Wheat federal circuit decisions have split on the question of whether a waiver eliminates further claims based on conflict. [Citations omitted.]

. . . In Wheat, the five-Justice majority reaffirmed the well established presumption in favor of counsel of defendant's choice. [Citation omitted.] The United States Supreme Court nevertheless affirmed the trial court's grant of the prosecution's motion to disqualify joint counsel, and held the trial court should be given wide discretion in this area. [Citation omitted.] Justice Stevens, joined by Justice Blackmun in dissent, agreed that the trial court should be given wide discretion, but found that discretion abused by a grant of the government's effort to deny the defense joint counsel of their choice. [Citation omitted.] Thus, although seven Justices differed in outcome on the facts in Wheat, there was broad agreement that the trial court must be given latitude in its efforts to navigate the Scylla and Charybdis posed by the conflicting Sixth Amendment rights to counsel of one's choice and to competent counsel. We conclude that trial court discretion is necessary because of the tension between these two important rights that must be resolved by the trial court at a time when all relevant information is typically unavailable due to both attorney-client confidences and reluctance to expose trial strategies in advance.

It does not follow, however, that because a trial judge may properly refuse a waiver even if the waiver is knowing and voluntary, a trial judge must do so. Although a fair trial is the ultimate goal, we believe an important step in evaluating whether the actual conflict or serious potential for conflict is sufficient to override the defendant's express choice of counsel is an assessment of the defendant's apprehension of the dangers of joint representation. Even if the defendant's consent to joint representation is ultimately determined to preclude a subsequent claim of ineffective assistance grounded in conflict, trial courts should still make appropriate inquiry. And, regardless of the ultimate resolution of the issue left open in Wheat, we think the presumption of deference to the defendant's choice is strengthened by confidence that it is an informed and individual choice by the defendant. Thus, the trial court should attempt to discern "whether the defendant knew enough to make the choice an informed one—a rational reconciliation of risks and gains that are in the main understood." [Citation omitted.]

. . . [T]he trial court's questioning was quite brief. It established in conclusory terms that Latta had been informed of the risks associated with joint representation and that she wished for Studtmann to represent her, but did not develop any record as to what her understanding of those risks was. At the postconviction hearing, Studtmann testified that he had explained the risks of joint representation to the Lattas "rather at length," and discussed the idea of separate counsel with them at the time he moved for separate trials. A trial court may be hard pressed to know how much questioning is enough to establish a knowing and voluntary waiver of a defendant's right to conflict-free representation. [Citation omitted.] Frequently the initiative to terminate joint representation before or at trial comes from the prosecution, not from a disgruntled defendant or from the court on its own motion. The reasons for this are typically tactical. A splintered defense is more likely to produce a plea agreement with weaker links in the defense chain and may ultimately produce that result as to all if some defendants become potential witnesses for the State. . . .

. . . .

. . . The first issue for the postconviction court was whether, under these circumstances, it was within the trial court's discretion to accept Latta's waiver of conflict-free representation. We think the defendant's waiver should be presumed valid, and the burden in postconviction proceedings is on the defendant to prove otherwise. If there is evidence supporting the conclusion of an uninformed, or worse, improperly influenced waiver, the postconviction court must assess the defendant's appreciation of the risks. If knowing and voluntary, the waiver is at least entitled to a very strong presumption of validity, and may be conclusive, because it invokes her right to counsel of her choice. If the waiver does not preclude a subsequent claim of ineffective assistance, there remains the issue, as Cuyler [v. Sullivan, 446 U.S. 335 (1980)] put it, of whether "an actual conflict of interest adversely affected [the] lawyer's performance." [Citation omitted.] If so, prejudice under Strickland is presumed.

. . . .

[T]he Court of Appeals concluded that the proceedings in the trial court constituted fundamental error—error so egregious that the entire proceeding was undermined—and was therefore available in postconviction proceedings despite waiver. There are several problems with this analysis. . . .

. . . Ordinarily . . . fundamental error analysis has no application in postconviction proceedings. . . . The flaw the Court of Appeals identified in Latta's conviction is at bottom ineffective assistance of counsel based on impaired counsel arising from joint representation. Latta consented to the joint representation. The issue as to that claim is whether that consent waived any claim of ineffective assistance. If it did, Latta cannot complain on appeal or in postconviction about the consequences of her election to proceed with joint counsel. If the waiver was defective, she has her claim of ineffective assistance and it is properly asserted in postconviction proceedings. . . . Because it involves balancing the conflicting Sixth Amendment interests, the merits of the claim may depend on the circumstances leading up to the defendant's consent to joint representation, but it has nothing to do with fundamental error.

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SHEPARD, C. J., DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

ANDERSON v. STATE, No. 82A01-0008-CR-283, ___ N.E.2d ___ (Ind. Ct. App. Mar. 16, 2001).

MATHIAS, J.

[T]he trial court denied the motion for separation, reasoning "it's got to be done before the trial starts, and the witnesses start testifying. You can't do it in the middle of the evidence." [Citation to Record omitted.]

Clearly, the trial court's ruling was correct under pre-Rules of Evidence authority. . . .

However, the separation of witnesses is now governed by the Indiana Rules of Evidence. Evidence Rule 615 provides, in relevant part: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. . . . ." There is no mention of when the request must be made.

In addition to the language of the rule, there is authority to support Anderson's position that his request was timely. See, e.g., 13 Robert L. Miller, Indiana Practice, § 615.102, at 280 (2d ed. 1995) ("Rule 615 does not specify the timing of the order. There is some authority for the proposition that a motion may be made at any time, even after some witnesses have testified.") . . . [Citation omitted.]

Ideally, a motion for separation of witnesses will be made before any witness testifies. However, a motion sometime after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended. Here, where a witness had only

begun to testify about general background information, Anderson's motion for separation of witnesses should have been granted. Nevertheless, reversal is not required.

"[A]n error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor . . . .

. . . .

SHARPNACK, C. J., and SULLIVAN, J., concurred.

CIVIL LAW ISSUES

DEGUSSA CORP. v. MULLINS, No. 49S05-9812-CV-763, ___ N.E.2d ___ (Ind. Mar. 16, 2001).

SULLIVAN, J.

Lenita Mullens filed a complaint against Defendants for negligently exposing her to products which allegedly caused her to suffer permanent lung damage. Defendants moved for summary judgment asserting that Mullens filed her complaint after the expiration of the two-year statute of limitations for her products liability claim. Finding that Mullens filed a timely claim, we affirm the trial court's denial of Defendants' summary judgment motion. . . .

. . . .

On March 17, 1992, Dr. Watkins diagnosed Mullens with bronchitis. Dr. Watkins told Mullens that it was possible that her coughing and breathing problems were work-related, ...

On March 26, 1992, the specialist, Dr. Reihman, told Mullens that it was possible that work-related chemical exposure only was triggering an injury caused by something else. . . . On June 11, 1992, Dr. Reihman made the following observation: "The etiology of Mrs. Mullens['s] chronic airflow obstruction and its relationship to her work environment remains unclear." . . .

Dr. Reihman was ultimately unable to determine the cause of Mullens's problems and referred her to Dr. Joe Garcia, a pulmonary specialist, ... At Mullens's first visit with Dr. Garcia in June, 1992, Dr. Garcia repeated Drs. Watkins's and Reihman's assessments, telling Mullens that chemical exposure at work might be related to her ailments but that other causes were possible. Dr. Garcia treated Mullens and attempted to diagnose her problems from June, 1992 until March, 1994, when Mullens and her attorney received the first unequivocal statement from any doctor that her lung disease was caused by exposure to chemicals consistent with those used at Grow Mix.

. . . .

While the present case is one based on a products liability claim, case law regarding medical malpractice claims is instructive because medical and diagnostic issues are common between the two actions, the statute of limitations for both claims is two years, and discovery is sometimes at issue in determining whether the respective statutes of limitation have been triggered. . . .

We agree with the Court of Appeals's assertion in the present case that a plaintiff need not know with certainty that malpractice caused his injury, to trigger the running of the statutory time period. See Degussa Corp., 695 N.E.2d at 178. Once a plaintiff's doctor expressly informs the plaintiff that there is a "reasonable possibility, if not a probability" that an injury was caused by an act or product, then the statute of limitations begins to run and the issue may become a matter of law. [Citation omitted.] . . .

Although "[e]vents short of a doctor's diagnosis can provide a plaintiff with evidence of a reasonable possibility that another's" product caused his or her injuries, a plaintiff's mere suspicion or speculation that another's product caused the injuries is insufficient to trigger the statute. [Citation omitted.] . . .

Circumstances where a physician tells a patient that a product or act is one of several "possible" causes of an injury present a complex of factually and legally relevant questions about how the physician conveyed the information to the patient and what emphasis the physician placed on the potentially tortious cause over other causes. Nevertheless, Mullens was responsible and diligently followed her physician's recommendations, undergoing further tests and attempting to gather information regarding the cause of her medical problem and its relationship to past respiratory ailments before initiating a lawsuit against Defendants. Mullens attempted to gather information that would transform speculation into a causal link that was "reasonably possible" or "probable" before she filed suit against Defendants.

On March 17, 1992, Mullens merely suspected that work products had something to do with her illness and Dr. Watkins said nothing to confirm, deny, or even strengthen her suspicions. In light of the ongoing medical consultation that Mullens undertook between March 17, 1992, and March 25, 1994, the date Mullens filed her complaint, we do not believe that the statute was triggered as late as March, 1994, as argued by Mullens. However, we also see nothing in the record to indicate that on March 17, 1992 (or even in the following eight days that would have been outside of the statutory period), Mullens's physicians had yet informed her that there was a reasonable possibility, if not probability, that her ailments were caused by work chemicals.

. . . .

SULLIVAN, J.SHEPARD, C. J., concurred.
BOEHM and DICKSON, JJ., concurred - except as to part II.
As to part II, DICKSON, J., filed a separate written opinion in which he dissented and in which BOEHM, J., concurred, and in which SHEPARD, C. J., and SULLIVAN, J., dissented.
RUCKER, J., did not participate.
[Editor's note: Part II was not quoted.]

MATTER OF THE UNSUPERVISED ESTATE OF McNABB, No. 18A05-0007-CV-300, ___ N.E.2d ___ (Ind. Ct. App. Mar. 19, 2001).

McNabb asserts that because Liberty's closing statement was deficient and because he did not receive service of the closing statement IC 29-1-7.5-7 should not bar his petition. His argument is premised upon IC 29-1-7.5-4, which permits a personal representative to close an unsupervised estate by filing a verified closing statement stating that she has completed her duties, including distribution of all the assets of the estate to the persons entitled to receive the assets, and has sent a copy to all distributees. IC 29-1-7.5-4(a)(5)-(6). McNabb directs us to Liberty's failure to recite in her closing statement the requisite statement that she had distributed all of the assets of the estate to the persons entitled to receive the assets and to his affidavit that he did not receive a copy of the closing statement.

We hold that IC 29-1-7.5-6 and IC 29-1-7.5-7 are statutes of repose that operate as absolute bars to claimants, heirs and devisees after the applicable time periods have expired. By their terms they bar, not merely the remedy, but the right of recovery. [Footnote omitted.] These bars operate notwithstanding deficiencies in the closing statement or lack of notice.

An heir or devisee who consents to unsupervised administration does so at his peril. By his consent – freely and knowingly given – he waives his right to court supervision of the administration of the estate. By such waiver, an heir consenting to unsupervised administration avoids court intrusion into the estate but gives up the protections flowing from such intrusion. Therefore, it is incumbent upon such heirs and devisees to take such action as may be appropriate to monitor the progress of estate administration. If, at any time, the heir or devisee has reason to believe that administration should be supervised, he has the right to petition the court for supervised administration. *See* IC 29-1-7.5-2(d).

Here, McNabb consented to the unsupervised administration of his father's estate. In his consent, he acknowledged that he understood that the court would not be overseeing the activities of the personal representative in any way. Notwithstanding the clear language of this consent, the Record fails to show any instance in which he took any action whatsoever to monitor the administration of his father's estate either before or after the filing of the closing statement. He had the right to challenge the closing statement within three months of its filing. He did not do so, and his right to do so thereafter was barred by IC 29-1-7.5-4.5. In addition, he had the right to make a claim against the personal representative within three months of the closing statement. He did not do so, and his right to do so thereafter was barred by IC 29-1-7.5-6. Finally, he had the right under IC 29-1-7.5-7 to seek the recovery of property improperly distributed for the period of one year after the closing statement. He took no action, and, once again his right to do so thereafter was barred by the statute.

IC 29-1-7.5-6 provides an exception to the three month bar and provides in relevant part: "The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate." Thus, the deficiency of the closing statement and Liberty's failure to serve McNabb, if true, might have subjected Liberty to liability as personal representative for "fraud, misrepresentation or inadequate disclosure." [Citations omitted.] Such an action would likely be governed by the statute of limitations applicable to fraud, misrepresentation and inadequate disclosure claims. [Citation omitted.] To the extent that he believed that he had a claim to recover from Liberty for fraud, misrepresentation or inadequate disclosure relating to the settlement of his father's estate, McNabb could have brought an action against Liberty during her lifetime or filed a claim against her estate after her death. Again, the Record fails to show that he took any such action.

NAJAM, and VAIDIK, JJ., concurred.

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